FILE COPY.

830

Office Supreme Court
FILED
NOV 5 1903
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 79.

MATILDA R. BEASLEY AND JOSEPH C. BEASLEY,
Appellants,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

FILED JUNE 27, 1902. (18,597.)

BRIEF OF PLAINTIFF AND APPELLANT.

E. B. KRUTTSCHNITT,
W. P. HALL,
Solicitors.

CAUCASIAN & CARNEY BROS., SHREVEPORT, LA.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 79.

MATILDA R. BEASLEY AND JOSEPH C. BEASLEY,
Appellants,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

Appeal From the United States Circuit Court of Appeals for the Fifth Circuit.

FILED JUNE 27, 1902. (18,597.)

BRIEF OF PLAINTIFF AND APPELLANT.

E. B. KRUTTSCHNITT,
W. P. HALL,
Solicitors.

The plaintiff filed her bill in equity in the United States Circuit Court for the Fifth Circuit and the Western District of Louisiana, wherein she alleged that the Texarkana, Shreveport and Natchez Railway Company traversed her plantation, situated on the right bank of Red River, in Caddo parish, Louisiana,

tor a distance of one and five-eighths miles, and the land of her friend, W. F. Dillon, for a distance of four and a half miles, and that the right of way through these lands was worth six thousand dollars;

That in order to secure the right of way through said lands the said railway company gave her five hundred dollars, and as a further consideration it agreed to build and maintain a depot on said lands of petitioner, and as a further consideration it agreed "that said grantee or its *assigns* shall not build or establish any other depot along the line of said railroad within three miles north or south of the one above stipulated for." (Italics ours.)

That under said contract the said railroad company built its road over said lands and built a depot at Uni station on her plantation, and your orator spent more than eight thousand dollars for buildings and improvements in the way of building a town upon the faith that no rival depot would be built within the said limit of three miles;

That there is no public necessity or demand for any depot within said limits;

That on the 5th day of February, 1901, the said Texarkana, Shreveport and Natchez Railway Company sold said railroad with all of its rights of way and franchises to The Texas and Pacific Railroad Company, a corporation organized under the Act of Congress of March 3, 1871, and Act of March 2, 1872;

That said Texas and Pacific Railway Company purchased said railroad subject to the obligations and stipulations contained in the said act of sale from your orator and is bound by the same

not to build a depot on said railroad within three miles of Uni station.

That in violation of said contract and obligation, the Texas and Pacific Railroad Company is now constructing a depot on said railroad at a point called Belcher, within less than three miles, to-wit, about one and one-eighth miles from the said depot at Uni station on orator's plantation, and unless restrained by injunction the depot will be built and operated and she will be damaged by the destruction of the value of improvements placed upon said property and by the loss of all advantages derived from said contract amounting to more than fifty thousand dollars, "which loss and destruction of her property will be irreparable and for which she has no adequate remedy at law, and that an injunction is necessary to preserve her rights." Record p. 1.

The defendant company appeared and filed a special demurrer to the jurisdiction of the court on the ground:

"First, That it appeareth by the plaintiff's own showing in her said bill that she is not entitled to the relief prayed for therein against this defendant, for the reason that it appears from the allegations of said bill that she has a full, adequate and complete remedy at law, if any remedy she has, and this court is without jurisdiction, and further there being no allegation or averment in said bill that this defendant is not solvent or able to respond to any recovery she may obtain in a court of law." Record p. 7.

This demurrer to the jurisdiction of the court as a court of equity was argued and sustained by the court and complainant's bill dismissed, and she appealed to the Circuit Court of Appeals for the Fifth Circuit, and assigned as error—

"1. That the said court erred in sustaining the demurrer interposed and filed by defendants to plaintiff's bill in equity and dismissing said bill, and by holding and deciding that complainants have no right to the relief in equity, as prayed for in said bill, but that complainant's have only an action at law for damages." Record pp. 8, 10.

The Court of Appeals, after hearing the case, reversed the judgment of the Circuit Court, but rendered practically the same decree, the only change being a reservation of complainants' right to sue for damages if any she had. Record p. 14.

From this judgment complainants appealed to this Honorable Court and assigned as error the decree and judgment of said United States Court of Appeals in sustaining said demurrer and in holding that complainants were without right to the writ of injunction on the equity side of the Court and that complainants were without right to relief in equity as prayed for in the bill of complaint, and in holding that complainants' only relief was by a naction at law, and in ordering that said bill be dismissed by the Circuit Court for the Western District of Louisiana for want of jurisdiction to entertain said suit on the equity side of the Court.

ARGUMENT.

It will be observed that the defendant did not demur to plaintiff's suit on its merits and did not raise the question whether she had disclosed a cause of action, but demurred solely to the *jurisdiction of the Court to hear the matter addressed to it on the equity side.* So that no question of the legality of the contract

declared upon by the plaintiff was before the Court, but the only question was one of equity jurisdiction.

The question is not whether the Court after hearing her on the merits will grant her any relief, but whether she has the right to be heard.

The case of Marshall vs. Texas and Pacific Railway Company, 136 U. S. p. 393, is relied upon by the defendant, but it really supports plaintiff and appellant. In that case, which was somewhat similar, the Court refused after a hearing on the merits to grant the injunction prayed for; but it *exercised jurisdiction* of the case in passing upon the question of the right of the city to the injunction. The Court found that the railroad had substantially complied with its contract and refused the injunction. In doing this it heard the case on the equity side.

It is not the way it decided the case, whether for or against the plaintiff, that is important, but it is the fact tha it heard and decided he case at all, that shows that such cases are properly presented to the equity side of the Court.

It is true the Court suggested that if the city had any other rights they might be enforced in an action at law for damages. So in this case. If the Court should find, after hearing plaintiffs' demand for an injunction, that it can not be granted, it can refuse it, and if it thinks plaintiffs might still be entitled to damages it could, as in that case, suggest a suit at law.

But what we insist upon is that we have the right to be heard upon the equity side of the Court when we apply for an injunction; that the equity side alone has the right to grant or refuse an injunction.

If the defendant had demurred to the petition and set up that it disclosed no reason in law or equity why an injunction should issue, the Court would have passed upon the question presented and have sustained or overruled the demurrer; but instead of this, it demurs that the equity side of the Court has no jurisdiction to pass upon the question of our right to an injunction. If the equity court has no jurisdiction to pass upon our demand for an injunction, no other court has such jurisdiction; and to so hold would be to say that there is no court in which the plaintiffs can appear and have their claims passed upon.

It may be that when the Court comes to pass upon the merits of the case it will find that they are not entitled to an injunction, but that is no reason why it should not exercise the jurisdiction to pass upon the question.

We submit that the Court erred in construing the Marshall case above cited as holding that the equity side of the Court was without jurisdiction to hear and decide the question of a right to an injunction, when, in fact, the Court did exercise such jurisdiction in that very case.

The allegations of the plaintiff's bill must all be considered in connection. She alleges that the real estate would, in effect be destroyed and that the injury will be irreparable. The building of a rival depot so near will cause the destruction of the value of the improvements and of the land itself and this is, in effect, the destruction of the property.

This is a Louisiana contract, affecting Louisiana property and is governed by Louisiana law.

The Code of Practice, Art. 296, is in these words: "Injunc-

tion, or prohibition, is a mandate obtained from a court, by a plaintiff, prohibiting one from doing an act which he contends may be injurious to him or impair a right which he claims."

Art. 298 provides that: "The injunction must be granted and directed against the defendant himself, in the following cases:

"3. When the defendant has commenced some *building* or some other works on a real estate, the ownership or possession of which is contested by the plaintiff or pretends that such building or works would *be injurious to his interest.*" (Italics ours.)

These are broad terms and clearly cover the case at bar. The idea is that wherever the right to *build* is involevd that an injunction will lie to prevent it.

And generally an injunction may issue in Louisiana to prevent any act which if performed would give rise to an action for damages. Slaughter House Co. vs. Larrieux, 30 A. 799.

In Levy vs. Waterworks Co., 38 Annual p. 29, the Supreme Court of Louisiana said: "The codal provisions of our practice touching injunctions are broader and more comprehensive than the rules of the chancery courts and include causes for injunctions that would not be sanctioned in a common law court."

But if we turn from our own State to the jurisprudence of the Federal Courts we find our right to the equitable remedy of injunction resting upon the firmest foundation.

To defeat the equity jurisdiction of the Court, it is not sufficient that there should be a *remedy at law*, but it must be a plain, adequate, *practical* and *effectual* remedy.

Now, the remedy which the defendant suggests in argument

is a suit for damages for the building of a rival depot, and therefore a rival town. It would be difficult to conceive of a case where the remedy at law would be more incomplete, inefficient, inadequate and impracticable.

The amount of damages would be wholly conjectural. Nobody could tell which town would finally prevail in the field of competition. All that any witness could do in advance would be to express an opinion.

And if plaintiffs waited and each year brought suit for the damage already done, it would require a multiplicity of suits as well as still be largely a matter of conjecture as to how much of a town they might have built and how much they might have made by the sale of town lots, etc. In such cases the remedy at law serves none of the requirements of the rule.

We make the following quotations from the courts and text writers, defining and applying the rule, and we submit that they fully justify plaintiffs in applying to a court of equity for relief:

"It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity." Boyce's Executors vs. Grundy, 3 Peters, 215.

To bar equitable relief the legal remedy must be equally effectual with the equitable remedy as to all of the rights of the complainant. Where the remedy at law is not as practicable and efficient to the ends of justice and its prompt administration, the aid of equity may be invoked." Lewis vs. Cocks, 23 Wallace, 470.

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is

as efficient as the remedy which equity would confer under the same circumstances." Killburn vs. Sunderland, 130 U. S. 514.

Mr. Pomeroy in his Equity Jurisprudence, Sec. 1357, Vol. 3: "Judges have been brought to see, and to acknowledge, contrary to the opinion of Chancellor Kent, that the common law theory of not interfering with persons until they shall have actually committed a wrong is fundamentally erroneous; and that a remedy which prevents a threatened wrong is, in its essential nature, better than a remedy which permits a wrong to be done and then attempts to pay for it by the pecuniary damages which a jury may assess."

In the case of Payne vs. Kansas & A. Val. R. R., 46 Federal Reporter, p. 553, the railroad company, having expropriated a right of way over plaintiff's land for terminals for its railroad bridge, undertook to use the same as a passage way for persons and vehicles to reach the same bridge converted into an ordinary toll bridge, and thereby seriously affected plaintiff's ferry privileges on the river beneath. The plaintiff applied to the court of equity for an injunction and was met by a demurrer to the jurisdiction on the ground that he had an adequate remedy in a suit at law for damages. In that case Justice Parker said, at page 553:

"It seems to need but a moment's reflection to satisfy the mind that equity, in a case of this kind, is more efficient to secure the ends of justice and its prompt administration than law; that greater justice may be more promptly secured by an appeal to equity, that the wrong may be stopped in its inception, rather than compel the injured party, or the party about to be injured, to wait

until all the wrong is done, and then drive him to his action at law, to get damages in reparation of a wrong of a repeated and continuing character, when the amount of damages is estimable only by conjecture, and not by any accurate standard."

If this had been written for the case at bar it could not have been more fittingly expressed.

The learned judge quotes the Supreme Court of Pennsylvania as declaring, in Cam vs. Railroad Company, 24 Pa. St. 159, "that courts will interfere by injunction to prevent wrongs of a repeated and continuing character, but which occasion damages which are estimable only by conjecture, and not by any accurate standard, *and in this is what is meant by irreparable damages, or mischief, in injunction cases.*" (Italics ours).

These authorities would appear to be conclusive of the case, but the strongest decision and the one in which the facts were most like the case at bar is yet to be cited.

We refer to the case of Walla Walla vs. Walla Walla Water Company, 172 U. S. pp. 1-11. This was a bill in equity filed by the water company to enjoin the city of Walla Walla and its officers from erecting water works, on the ground that such an act would be a violation of the contract between the city and the water company, by which the company was to lay mains in the streets of the city and supply it with water, the city agreeing that until the company substantially failed in its duty, the city should not erect, maintain or become interested in any water works except the plaintiff's. The city demurred to the jurisdiction of the court of equity and upon this question the Court, at p. 11, through Mr. Justice Brown, said:

"3. The objection that a court of equity has no jurisdiction because the plaintiff has a complete and adequate remedy at law, is equally untenable. Obviously it has no present remedy at law, since the city has done nothing in violation of its covenant not to erect competing water works, and the water company has as yet suffered no damage. It is true that after the city has gone to the great expense of erecting a plant of its own and of entering into competition with the plaintiff company, the latter would doubtless have a remedy at law for breach of the covenant. In the meantime, great, perhaps irreparable, damage would have been done to the plaintiff. What the measure of such damage was would be exceedingly difficult of ascertainment and would depend largely upon the question whether the value of plaintiff's plant was destroyed or merely impaired. It would be impossible to say what would be the damage incurred at any particular moment, since such damage might be more or less dependent upon whether the competition of the city should ultimately destroy, or only interfere, with the business of the plaintiff.

"This Court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. 3 Peters, 210, 215; 13 Wallace, 616, 621; 130 U. S. 505, 514; 143 U. S. 79, 95.

"Where irreparable injury is threatened, or the damage be if such a nature that it can not be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his

remedy by injunction. In such a case as this, the remedy will save to one party or the other a large pecuniary loss—to the city, if it be obliged to pay to the plaintiff damages occasioned by the establishment of its competing works—to the plaintiff, if it be adjudged that the city has a right to do so.

"But it is further insisted in this connection that, under section 8 of the contract, the city had the right at any time to take and condemn the water works of the company, and that in case of such condemnation, the contract should not be taken into consideration in estimating the value of the water works; and hence that if the city elected to establish water works of its own, without condemning those of the plaintiff company, the value of such water works would furnish the proper measure of damages in such action. This agreement necessarily assumes, however, that the damages in such action would be the same as in a proceeding for condemnation. Perhaps, if the plaintiff company were forced to abandon its works entirely by the competition of the city, the value of such works might furnish the measure of its compensation; but it could not be forced to do this, and if the company elected not to abandon, but to enter into competition with the city, the damages would have to be estimated by the probable injury done to the company by such competition. This, as above indicated, would furnish a most uncertain basis."

What is here so well said by the Court is conclusive of the case at bar. In that case where the damages would arise from having competing water works, the Court refused to send the plaintiff to an action for damages, as there was no standard by which they could be fixed, they would be continued, estimative

and conjectural. The remedy was neither adequate, complete, practical nor efficient to the ends of justice and its prompt administration, as the remedy in equity and the latter was maintained.

So in the case at bar. The damages will arise from building a competing depot and town within 1 1-8 miles of plaintiffs' town at Uni, and as it grows it will impair the value of the town lots and the rental value of the stores and other improvements. But there is no standard by which such damages can be fixed. They are continued, estimative and conjecutral. The remedy at law is neither effectual, practical nor does it tend to the prompt administration of justice.

Every consideration that justified the Court's decision in that case would justify a similar decision in the case at bar.

But it may be contended that the plaintiffs' allegation (for jurisdictional purposes) that they would be damaged more than fifty thousand dollars, shows that the amount of damages are fixable and determinate. But it shows nothing of the kind.

It would be difficult to conceive of a more indefinite statement ,as there is no upward limit at all.

But how does this show that the amount can be fixed? Does the defendant concede that this is the amount of the damages plaintiffs will suffer?

We doubt if the defendant would concede that we will be damaged to the amount of even ten thousand dollars.

Now, if we had alleged that the amount of damages had been fixed or were ascertainable by some standard or from some penal contract, there might be some merit in the contention. But the mere allegation that we would be damaged more than a certain

sum, fixed nothing. The amount is still as much a matter of conjecture, of opinion, of estimate, as if no such allegation had been made? Is the defendant bound by it in an action for damages? Has it admitted that the amount there stated is correct?

The contention is not worthy of serious consideration.

These considerations and authorities seem to have satisfied the Court of Appeals that the Circuit Court was in error in holding that an action at law for damages was an adequate remedy.

The Court said: "It is not clear that the complainant has, for the wrong alleged a complete and adequate remedy at law. Damages are not always easily ascertained, and sometimes do not and cannot adequately compensate. A remedy which prevents a threatened wrong is in its essential nature nearer adequate and complete than a remedy which permits the wrong to be done aand then attempts to compensate by damages assessed by a jury. See Pom. Eq. Jur. Vol 3, Sec. 1357." Record p. 17.

But instead of reversing the judgment and decree which the Court thus found to be erroneous, it (the Court) raised a question not raised in the demurrer and not discussed in argument in the Court below or on appeal.

The Court finding that the demurrer alleging an adequate remedy at law was not sustainable, said that the defendant could at the hearing orally assign other grounds of demurrer and if the Court found them sufficient the bill would be dismissed and remarked that it was probable that the Court below allowed other grounds to be assigned since it rendered a judgment that would probably be a bar to any further action at law. Record p. 16.

However probable this may have appeared to the Court, it was not a fact.

No oral assignment of additional grounds of demurrer was made in either Court. Indeed, the Court of Appeals does not intimate that any such oral assignment of ground for the demurrer was made or argued before it.

The Court quotes Bates Federal Practice, Vol. 1, Sec. 204 as its authority. Bates says: "And the *defendant* may, on the argument, at the hearing orally assign other causes of demurrer, different or in addition to those assigned upon the record, which if valid will support the demurrer, although the causes of demurrer stated upon the record be held to be invalid." (Italics ours.)

Giving to this rule its fullest effect, at most it only permits the *defendant* to add to his demurrer other grounds orally in the argument.

It does not authorize the *Court* to originate and supply such additional grounds on a mere suppostiion that they may have been urged in some other court when in fact they have not been so urged, and when the fact that they were not urged on appeal, so far from making it probable that they were urged in the lower Court, ought to have satisfied the Court that they were not so urged.

We submit that the Court can not add to the demurrer by supposing the defendant has done so in some other court.

But if this Court is of the opinion that the question of the legality of the contract was properly raised by the Court of Appeals (though not by the defendant) we concede that such agree-

ments are subordinate to the public convenience and the courts so hold; but where no public interest or convenience requires it there is no reason why the courts should interfere to declare them null and void.

The bill alleges "that there is no public necessity or demand for any depot within said limits." Record p. 2.

Here again the Court assumes that this is largely a conclusion of the pleader and not to be taken as conclusively admitted by the demurrer. And why not? We submit that it is not a conclusion of law but a distinct statement of a fact. How else could it be stated more plainly? It is an assertion of a negative fact. Would it be necessary to give the number of people and amount of traffic in detail? All of that would properly come up in the evidence at the trial.

The Court says it is a conclusion of the pleader. It is no more a conclusion than is the statement of the plaintiff in a revocatory action that his debtor is "insolvent" or that he is "without means to pay his debts"; must he set forth the amount of the debts and the assets in detail? Must we set forth in detail just how many people wanted the depot and how many did not?

The Court does not say that it is a conclusion *of law* but only that it is a conclusion of the pleader.

The very object of a demurrer is to test the question whether admitting the facts to be as stated, the relief prayed for could be granted.

It is distinctly stated in the bill as a fact that there is no public necessity or demand for a depot. The bill alleges that it is proposed to build the depot within a mile and an eighth of the

depot at Uni. Is the statement that there is no public necessity or demand for it unreasonable?

Is it unreasonable or a mere conclusion of the pleader to say that there is no public necessity or demand for a depot in a mile and an eighth of another in a sparsely settled country where depots are usually from six to ten miles apart?

The railroad does not pretend that there is any public necessity or demand for this depot, and makes no such additional assignment of ground for demurrer. The contract is not immoral in itself, and if voidable is not utterly void. The railroad by pleading and proving that necessity or public convenience required it, would be relieved, but it has not asked to be relieved, and the case is not one where the courts should interfere to declare a contract null and void on its own motion, as thre is nothing in it contrary to good morals.

If it had been suggested in the lower Court that our allegation that there was no public necessity or demand for the depot was not to be taken for true we would have offered to amend by stating in full and in detail how it is that the railroad is about to build this depot so near to the other, and if the case should be remanded to the Circuit Court with leave to amend under Equity Rule 35, we will amend by alleging the facts which are these: There is much ill feeling and rivalry between complainant's husband and a neighbor whose business partner is a member of the Railway Commission of Louisiana, and the proposition to build a depot at Belcher was repeatedly presented to the Railway Commission by this member and voted down as unnecessary by a majority vote, but finally after a change of one of the members it

was ordered against the objection and protest of the defendant railroad company, which rather than antagonize the Railway Commission yielded a reluctant assent to the requirement.

We will allege and prove that this neighbor, whose business partner is a member of said Commission, is largely interested in a plantation at Belcher and was and is urgent for the building of this depot for the benefit of his property, and that finally before ordering the depot to be built the Commission telegraphed to the defendant railroad company and asked if it would build the depot if ordered and the company replied that it would be a great hardship to have to build another depot so close to the one already built, but it would have to do it.

We would allege and prove that the railroad does not wish to build the depot, that it does not regard it as at all necessary, that it opposed it repeatedly before the Railroad Commission and finally submitted to the requirement rather than antagonize the Commission and engage in litigation. We would allege and prove that the depot at Uni is ample for the needs of the community and that there is no public necessity or demand for it as we have alleged.

Art. 284 of the Louisiana Constitution, defining the powers of the Railway Commission, gives the Commission power "to require all railroads to build and maintain suitable depots, switches and appurtenances, wherever the same are necessary at stations," and we would allege and prove, besides being unnecessary as already alleged, that Belcher is not "a station."

By the Court's raising the question on appeal and declaring our allegations to be mere conclusions of the pleader, we have

been denied the equitable right given by Rule 35 to amend our bill and state more fully the facts upon which we rely for relief.

If the railroad as a quasi-public institution had found it necessary to build this depot we concede its right to do so, but where the power of the Railway Commission is being used in a private rivalry between neighbors and the railroad is forced to build and maintain a depot where none is required, we ask in all earnestness that the Court allow all of the facts to be heard before shutting the door against a petition addressed to the equity powers of the Court.

We respectfully ask and pray that the demurrer be overruled and the suit be remanded to the Circuit Court with leave to amend, and to be proceeded with as may be ordered.

Respectfully submitted,

E. B. KRUTTSCHNITT,

W. P. HALL,

Solicitors for Complainant.

W. P. Hall.

E. B. Kruttschnitt

Solicitors for Complainant

& Appellant.